

THOUGHT LEADERSHIP

News

EARTH MOVEMENT AND DEFECTIVE WORK EXCLUSIONS PRECLUDE DEFENSE AND INDEMNITY FOR HOMEBUILDER – SUMMARY JUDGMENT GRANTED

Newsbrief

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The United States District Court in the Southern District of Texas recently granted summary judgment in favor of an insurer after a homebuilder sought coverage from a homebuyer's construction defect claims. In *Mid-Continent Casualty Company v. McCollum Custom Homes, Inc.*, No. 4:18-CV-4132 (S.D. Tex. May 20, 2020), a suit arose for various construction defects including but not limited to the foundation on a custom home in Houston that sold for over \$2,000,000. The homebuyer sued the builder, McCullum, seeking damages for the defects in the home. The builder turned to their commercial general liability insurance policy with Mid-Continent to defend and indemnify them from the homeowner's suit. Concurrently, while providing a defense to the builder, the insurer sought a declaration that their Insurance Agreement did not impose a duty to defend or indemnify the builder under the policy's "Earth Movement" or "Defective Work" exclusions.

The Federal District Court analyzed the policy exclusions against three categories of allegations that purportedly triggered the insurer's duty to defend. The three categories analyzed were: (1) purported damages to the flooring from the builder's alleged mishandling of the materials; (2) alleged pool damages which the builder claimed were due to the actions of a third-party; and (3) a laundry list of other alleged damages mostly tied to the home's foundation. The Court found the Defective Work exclusion covered the damages to the flooring based on improper handling and installation on the builder's part. For the damages to the pool, the builder tried to point to the actions of a third-party installer. However, the Court could not look at the third-party's actions and ruled it was constrained by the eight-corners rule to only consider the Petition and the Insurance Agreement, which did not cover the actions of the third-party or alternatively excluded the damage under the Earth Movement exclusion. The Court then analyzed the laundry list of remaining damages and found the insurance did not apply to the builder's defective work, deficient soil moisture foundation investigation and analysis, or improper foundation design. Since the remaining laundry list construction defects could all be linked back to naturally occurring earth movement causing shifting in the foundation, which was within the scope of the policy's Earth Movement exclusion, the Court found there was no duty to defend the builder by the clear language in the policy. The Court granted summary judgment for the insurer on the duty to defend.

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Additionally, the Court found that there was no duty for the insurer to indemnify the builder because the builder failed to implement the home's drainage system as designed. The Court granted summary judgment holding the builder did not meet its burden in showing a duty to indemnify the builder to the homebuyer, and noted had indemnification coverage been triggered it would have fallen plainly within the Defective Work exclusion in the insurer's policy.